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No. 86-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP,
Petitioners,

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM, U.S., INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, at the time of Mississippi's statehood in 1817, the lands under the non-navigable but tidally influenced inland waters were conveyed by the United States to Mississippi as part of the state-owned public trust.

PARTIES TO THE PROCEEDING BELOW

In the proceeding before the Mississippi Supreme Court, the appellants were Cinque Bambini Partnership, Carroll W. Allen, Lydia Carroll, Hamilton Allen, Harry B. Kelleher, Spooner Petroleum Company, Enserch Exploration, Inc., and Phillips Petroleum Company. Only Phillips Petroleum Company and Cinque Bambini Partnership are petitioners in this Court.

The appellees below, and the respondents in this Court, were the State of Mississippi and Saga Petroleum U.S., Inc.

RULE 28.1 LISTING

The Rule 28.1 list of parents, subsidiaries and affiliates of Phillips Petroleum Company, a petitioner herein, is contained in Appendix C of the petition for writ of certiorari, Pet. App. 75a-77a. There have been no changes in that list since the filing of the petition, except that Bissendorf Biosciences GMBH has become a subsidiary of Phillips Petroleum Company. Also, the name Alyeska Pipeline Service Company was misspelled on the original list.

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On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR PETITIONERS

The petitioners respectfully pray that this Court, upon a full review of the facts and the arguments, reverse the judgment of the Supreme Court of Mississippi and remand the case for further proceedings consistent with this Court's judgment and opinion.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, as modified on rehearing, is reported at 491 So.2d 508. It is reprinted in Appendix A to the petition for writ of certiorari, Pet. App. 1a-26a.

The Findings and Ruling of the Chancery Court of Hancock County, Mississippi, as well as its Final Judgment and Decree, are not officially reported. They are reprinted in Appendix B to the petition for writ of certiorari, Pet. App. 29a-74a.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 14, 1986, Pet. App. 27a.[1] A petition for rehearing was denied on July 30, 1986, accompanied by a modification of the original opinion of the court. Pet. App. 28a.

Following an extension of time by order of Justice White, the petition for writ of certiorari was timely filed on November 28, 1986. On February 23, 1987, the Court granted the petition. On April 6, 1987, the Court denied the motion of the respondent State of Mississippi to dismiss the writ of certiorari as improvidently granted.

The jurisdiction of this Court is invoked under 28 U.S.C §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article IV:

> "Section 3. New States may be admitted by the Congress into this Union; . . ."

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[1] In this brief, "Pet.App." references are to the appendix to the petition for writ of certiorari. References to "J.A." are to the joint appendix filed in this Court after the grant of certiorari. References to "R." are to the original record, in bound volumes, which has been certified and lodged with the Clerk of this Court.

Act of March 1, 1817, 3 Stat. 348-349:

> "Sec. 1. . . . the inhabitants of the western part of the Mississippi territory . . . hereby are authorized to form for themselves a constitution and state government . . . and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.
>
> * * * * *
>
> "Section 4. *And be it further enacted,* . . . that no taxes shall be imposed on lands the property of the United States, and that the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state, as to other citizens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state."

Congressional Resolution of December 10, 1817, 3 Stat. 472, 473:

> "*Resolved* . . . That the state of Mississippi shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever."

The Coastal Wetlands Protection Law, Sec. 49-27-5, Mississippi Code Annotated (Supp. 1986):

> "a) 'Coastal wetlands' means all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high-tide; all publicly owned accretions above the watermark of ordinary high tide and all publicly

owned submerged water-bottoms below the watermark of ordinary high tide."

STATEMENT OF THE CASE

This land title dispute comes here on writ of certiorari to the Supreme Court of Mississippi. It involves a major and unprecedented federal question. At the time Mississippi entered the Union in 1817 on an equal footing with the original states, did the public trust lands conveyed by the United States to Mississippi include the lands under the tidally influenced but non-navigable inland waters? In other words, did that public trust conveyance, as a matter of federal common law, encompass what Lord Hale's 17th century manuscript, *De Jure Maris* (in Moore, A History of the Foreshore 374), described as non-navigable "little streams and rivers that are not a common passage for the king's people"?

A. The nature of the wetlands in issue

The basic underlying facts are not in dispute. Detailed findings of fact, including establishment of precise, surveyed boundaries separating the properties claimed by the State as public trust land from those claimed by the petitioners, are contained in the Findings and Ruling of the Chancery Court of Hancock County, Miss. (Pet. App. 29a-70a), and in that court's Final Judgment and Decree (Pet. App. 71a-74a). The Supreme Court of Mississippi did not purport to review or reassess the Chancery Court's factual findings. Rather, the Supreme Court addressed "the broad, general principles which must be settled before permanent surveyed or surveyable boundaries may be established." Pet. App. 26a. In one particular, not now relevant, the Supreme Court found that the Chancery

Court had misapplied those "general principles" when it held that two lakes created by dredging for highway fill material belonged to the State. Pet. App. 23a-24a. Otherwise, the case was remanded to the Chancery Court to establish the precise outer boundaries of the public trust lands as defined by the "general principles" of public trust dominion recognized by the Mississippi Supreme Court.

At the commencement of this suit in 1978, the title dispute between the State of Mississippi and the private landowners related to some 2400 upland acres of largely undeveloped agricultural land in Hancock County. The county is bounded on the south by the Mississippi Gulf Coast. The land in question generally lies some five or six miles north of the Gulf Coast, along the west bank of the Jourdan River. The Jourdan River itself flows into the Bay of St. Louis, an inlet of the Gulf of Mexico. Pet. App. 32a.

Only 42 of the 2400 acres originally in issue in this case were found by the Mississippi Supreme Court to be properly within the State's public trust domain. Those 42 acres consist of: (1) the north branch of Bayou LaCroix; (2) eleven unnamed drainage streams; and (3) the remains of Bayous Enceinte and Long Gar. The ebb and flow of the tide are discernible on these 42 acres of wetlands, at least for purposes of floating a toothpick under sail.

Bayou LaCroix eventually empties into the Jourdan River, a navigable stream. The eleven small drainage streams, which are not to be found on any ordinary map, range in size from .44 acres to 9.966 acres; the total surface area for six of the streams is less than one acre each. Pet. App. 2a. For the convenience of the Court, a portion of Exhibit P-167 is attached in the appendix to this brief, p. 1a, *infra*. Exhibit P-167, which is in the record, shows

the area in which these unnamed creeks are located, being designated C-1 through C-11.[2] These streams flow into either bayous or the Jourdan River.

Large parts of Bayous Enceinte and Long Gar were destroyed by dredging landfill for the construction of Interstate I-10. This resulted in the creation of two artificial lakes. Only the thread of these two bayous is still in issue, the court below having found that the State has no public trust claim to the artificial lakes.

Most of the wetlands in issue lie almost perfectly flat. From the earliest days, the patents or grants creating private holdings in this area made "no specific references to small streams, inlets or bayous located therein." Pet. App. 35a. There was, in other words, no attempt in these patents and grants "to except, meander or otherwise take note of the interior streams." Pet. App. 41a. The original survey lines ran straight across these waterways, making no mention or description of them. Nor do any of these wetlands constitute boundary lines for the privately owned fast lands.

Portions of the interior streams that have been found to be tidally influenced are only ankle deep or less at average or mean high tide. Exhibits S-187 through 191, R. 182-183. Some of the mean high tide boundaries of these tidally influenced wetlands consist of little more than a film of moisture around the roots of trees and grasses. Occasionally a fisherman has been seen on one or two of the streams. Pet. App. 41a.

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[2] Another map, showing the boundaries of the lands claimed by the private landowners, is attached as Exhibit "A" to the original Bill to Quiet and Confirm Title and To Cancel Title. Exhibit "A" is reproduced in the joint appendix before this Court. J.A. 27a.

Much of the acreage in question has been used over the years to raise timber, rice, clover, and soybeans. Pet. App. 41a. At one time before Interstate I-10 was built, one landowner used his land to pasture 400 head of cattle; each winter the marsh grass was burned off to provide good spring and early summer grazing for the cattle down to the water's edge. Pet. App. 41a. The cattle often grazed down to the edge of the Jourdan River and Bayou LaCroix and drank water from both the river and the bayou. Pet. App. 41a.

For over 150 years, record title to these acres, including those covered by the eleven streams and the bayous was quietly enjoyed by the private owners thereof, including the petitioners and their predecessors in interest. As the Mississippi Supreme Court noted, the petitioners and others "are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by the Act of the Congress, and from federal and state patents." Pet. App. 2a.[3] The Mississippi Supreme Court held, however, that no recognition is to be accorded Spanish land grants after 1783, citing *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How. 212, 225 (1845), and *Henderson* v. *Poindexter,* 25 U.S. (12 Wheat.) 530, 535-36 (1827). Since these grants dated from April 15, 1813, they came too late to be recognized; and the confirming acts of Congress of March 3, 1819, May 8, 1822 and May 28, 1830 were thereby rendered "of no force and effect" as to the lands in question. Pet. App. 19a. Whatever title to wetlands the United States

[3] The Supreme Court immediately added that such historical title avails the petitioners nothing "if the lands in dispute are a part of those held by the State of Mississippi by virtue of a trust created at the time Mississippi was admitted to the Union in 1817. For all practical purposes, the case turns on whether the disputed lands are a part of the public trust." Pet.App. 2a.

may have held was said to have been "effectively and irrevocably granted to the State of Mississippi as part of its public trust on the occasion of statehood in 1817." Pet. App. 19a.

Despite the holding that the private landowners' title to these wetlands was defective, it is undisputed that these landowners "have for over 150 years paid taxes on the entire acreage in these claims and grants." Pet.App. 41a. Thus taxes were paid on the wetlands in issue. It is equally clear that at no time during those 150 or more years did the State make any claim or assert any title to these wetlands. Nor is there any indication in the record that Bayou LaCroix or the eleven drainage streams were at any time used in fact for commercial navigation, although the Chancery Court asserted that the bayous were "capable" of carrying commerce with reasonable improvements. Pet.App. 35a.

The State never exhibited any interest in these privately held wetlands prior to the enactment of the Coastal Wetlands Protection Law in 1973. Miss. Code Ann. § 49-27-1 through -69 (Supp. 1986). This statute charged the Mississippi Marine Resources Council with the task of preparing maps identifying state-owned wetlands for regulatory purposes only. Section 49-27-5 defined the term "coastal wetlands" to include "all publicly owned lands subject to the ebb and flow of the tide; which are below the watermark of ordinary high tide."

Maps were then drawn from aerial photographs, purporting to show the extent of the wetland areas. The maps were necessarily imprecise. They were not drawn for the purpose of indicating legal titles or claims to any of the wetlands. They were drawn solely for the purpose of indicating the probable scope of the state wetlands, in an-

ticipation of possible environmental protective regulations.

Nonetheless, another state agency, the Mineral Lease Commission, recognized the possibility that valuable oil and gas resources might lie beneath these wetlands. Using the maps prepared by the Marine Resource Council, the Mineral Lease Commission treated the maps as indicative of the legal boundaries of state-owned public trust wetlands. It then began to sell oil and gas leases on the wetlands thus delineated.

In 1977 the Commission leased some 600 acres of wetlands in Hancock County, the record title to which had long been thought resident in the petitioner Cinque Bambini and others, to the respondent Saga Petroleum U.S., Inc. The leases were duly recorded in the chancery clerk's office in Hancock County.

Upon learning of these oil leases, Cinque Bambini and other record title holders instituted this suit in 1978 to confirm and remove clouds from their titles. The State of Mississippi and its lessee Saga Petroleum were named as defendants. J.A. 3a. Answers and counterclaims were filed by the defendants.

After extended proceedings in the Chancery Court of Hancock County, the court entered detailed findings and conclusions. Pet.App. 29-70a. The court held that only about 141 of the 2400 acres put in issue in this suit are within the state-owned public trust. The court found two categories of tidally-influenced wetlands within those 141 acres: (1) slightly over 98 acres consist of two lakes dredged by a state contractor in the mid-1960s to obtain fill material for the construction of Interstate I-10; and (2) slightly over 42 acres consist of the north branch of Bayou

LaCroix, the eleven small drainage streams, and the threads of Bayous Enceinte and Long Gar.

The Chancery Court made its own examination of the public trust doctrine. It concluded that the doctrine recognizes that all wetlands subject to the ebb and flow of the tide are part of the public trust domain, and that Mississippi acquired such wetlands when it entered the Union in 1817. In so ruling, the Chancery Court adopted the claim of the State and Saga Petroleum that

> ". . . any part of the property over which the tide ebbs and flows, up to the mean high water line, is owned by the State under the Public Trust Doctrine – literally – regardless of whether the watercourses were commercially navigable at Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea, and regardless of whether the water be commercially navigable even now." Pet.App. 32a.

B. The Mississippi Supreme Court Ruling

On the appeal by the private claimants, the Mississippi Supreme Court affirmed the Chancery Court's ruling in part and reversed in part. Specifically, the Supreme Court held:

(1) The two artifically created lake tidelands, created out of the former two bayous, do not belong to the State to the extent the lakes were not naturally within the tidal flow when dredging began. To strip those wetlands from the private record title holders would constitute an uncompensated taking in violation of both the federal and state constitutions. Pet. App. 23a-24a.

(2) The remaining 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, being tidally influenced in 1817 even though non-navigable, are within the public trust of Mississippi. See Pet.App. 2a, 15a. Such lands were effectively and irrevocably granted to the State on the occasion of statehood in 1817. The Supreme Court accordingly remanded the proceeding to the Chancery Court to establish more precise outer boundaries of these public trust wetlands. Pet. App. 26a.

In so ruling, the Mississippi Supreme Court addressed and relied upon what it conceived to be the decisive point of federal law[4] – "whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust." Pet.App.9a. The court acknowledged that all parties before it had addressed that federal question. The private claimants, said the court, had argued that, while early federal cases had referred to public trust land as including all lands within the "ebb and flow of the tide," subsequent decisions of this Court, beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), had translated the "ebb and flow" concept into a "navigable waters" concept. According to this argument, the state owned public trust included "only those waters navigable in fact in 1817, tidal influence being essentially irrelevant." Pet App. 8a. The State, on the other hand, argued that, "in addition to such navigable waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark." Pet.App. 8a-9a.

The Mississippi court could find "no federal case expressly deciding this point of federal law." Pet.App. 9a. It

[4] The court stated that "the question of what lands are given to the State in trust is necessarily a question of federal law." Pet.App. 7a-8a.

accordingly fashioned its own principle that, "as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability." Pet.App. 10a. In the course of marking the public trust boundaries by the tidal high water mark, the court referred to the physical fact that even navigable streams and channels contain some non-navigable parts, particularly near the shorelines. So, for purposes of dealing with tidally influenced waters, the court tried to equate the navigability-in-fact test with the ebb-and-flow test by creating a novel "toothpick" test, i.e.,

> ". . . so long as by unbroken water course — when the level of the water is at mean high water mark — one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust." Pet.App. 12a.

By way of summary, the Supreme Court expressed its understanding of federal law to be that, effective upon statehood on March 1, 1817, the United States granted to the State of Mississippi in trust all lands, to which the United States then held title (including their mineral and other subsurface minerals), subject to the ebb and flow of the tide below the then mean high water level

> "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the

> beds and streams of all non-tidal waters which were navigable in fact in 1817. This act of creation consummated, the federal soverign rested." Pet. App. 15a.

The court accordingly concluded that the 42 acres covered by the north branch of Bayou LaCroix and the eleven drainage streams, even if considered to be non-navigable except by a toothpick propelled by the tide, were part of the public trust conveyed by the United States to Mississippi in 1817. The fee simple titles stemming from the Spanish land grants and from the confirming Acts of Congress were thus held to be without force or effect as to the lands in issue.

The decision below means that the State is free to execute oil, gas and mineral leass to such companies as the respondent Saga Petroleum. Saga would then be free to drill into the wetlands below the mean high water mark, "regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea." Pet.App. 15a. And regardless of the fact that these wetlands, often tiny in scope, lie in the midst of privately owned fast lands.

SUMMARY OF ARGUMENT

The single question in this case is: What was the scope and nature of the public trust wetlands that Mississippi acquired upon its admission to the Union in 1817?

The answer given by the Supreme Court of Mississippi is: In 1817 Mississippi acquired title not only to the soil beneath navigable waters but also to the soil beneath non-navigable waters that are subject to the ebb and flow of the tide.

In declaring public trust ownership over non-navigable but tidally influenced wetlands, the Mississippi court extended such ownership to the farthest reach conceivable. Title attaches in such a case "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea." Pet. App. 15a.

No federal precedent exists for extending the public trust doctrine, or its companion equal footing doctrine, to cover such non-navigable wetlands. Such an extension misconceives the nature and the policy of both doctrines, and from at least three perspectives.

1. To the extent that the doctrines are rooted in the common law, English courts and writers never ascribed to the Crown any kind of soverign ownership over non-navigable wetlands. Private ownership was recognized as to such wetlands, even though they might be tidally influenced.

2. The same dichotomy between publicly owned navigable wetlands and privately owned non-navigable wetlands can be found in the common law of the original 13 states. Out of that law sprang the equal footing doctrine with respect to the ownership of lands beneath navigable rivers and streams.

3. The decisions of this Court that deal with the public trust and equal footing doctrines have uniformly treated lands under navigable waters as belonging to the public, while lands under non-navigable waters are subject to private ownership.

It is not surprising, therefore, that the Mississippi court

could find no federal precedent for rewriting and extending the public trust and equal footing doctrines in this fashion. Navigability in fact has become the *sine qua non* of the public trust doctrine. To add non-navigable wetlands to that doctrine at this late date is contrary to both the history and the policy of the doctrine. And when the expanded doctrine is created and applied more than 150 years after statehood, the doctrine can create inordinate disturbances in land titles and other commercial relationships, to say nothing of creating inequality in footing.

The time has come for this Court to reiterate once more that both the federal public trust doctrine and the federal equal footing doctrine encompass only those lands beneath the navigable waters of the respective states.

ARGUMENT

The Supreme Court of Mississippi has stretched the public trust doctrine beyond recognition. That court has done more than extend the doctrine to non-navigable tidal waters. It has extended the state public trust domain to the farthest conceivable reaches of the tidal ebb and flow, regardless of the commercial navigability of the water courses and "regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea." Pet. App. 15a; and see Pet. App. 12a.

Such radical revision of the body of the public trust doctrine is unprecedented. There is no case in early common law that recognizes public or royal ownership of lands beneath non navigable waters, whether or not tidally influenced. There is no such case in the common law of the

original 13 states. There is no such case in this Court's jurisprudence. And there is no precedent whatever for extending "ebb and flow" ownership beyond the shoreline of navigable waters and to the farthest inland reaches of the tide regardless of how insignificant the tidal influence, or how shallow the water."

The fact that Mississippi waited more than 150 years before asserting an interest in its non-navigable but tidally influenced wetlands strongly suggests that in 1817 no one, least of all the State of Mississippi, had reason to believe that the equal footing or the public trust doctrine required that lands under such non-navigable waters be kept in trust for the use of the public. See *Morgan v. Reading*, 11 Miss. (3 S.&M.) 366, 385-388 (1844).

As this Court has repeatedly said, it is "the ownership of land under navigable waters [that] is an incident of sovereignty" and it is only such lands that the Federal Government holds "in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." *Montana v. United States,* 450 U.S. 544, 551 (1981).[5]

We turn, then, to the historical and jurisprudential errors that mark the effort below to discover, in the name of federal law, "the boundaries of the properties granted the State of Mississippi in trust in the year 1817." Pet. App. 8a.

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[5] See also *United States v. Cherokee Nation of Oklahoma,* No. 85-1940, 107 S.Ct. 1487, 1492 (March 31, 1987), where the Court, quoting from *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842), noted that "the sovereign States gain 'the absolute right to *all their navigable waters and the soils under them* for their own common use' by operation of the equal footing doctrine." (Emphasis added).

1. Predicating Public Ownership of Wetland Solely on Tidal Ebb and Flow Misconceives the Common Law Roots of the Public Trust Doctrine.

The Mississippi court uses the tidal ebb and flow as a basis for concluding that the public trust doctrine in 1817 applied to non-navigable streams. Such use of the ebb and flow concept confounds the history and policy of the doctrine. It also revives an ancient controversy over the "tidewater" ingredient of the English common law, a controversy that this Court long ago put to rest.

Early on, English courts and writers frequently spoke of "tidewaters" or "ebb and flow" as a measure both of the King's ownership of underwater lands and of English admiralty jurisdiction. But close analysis of the English law makes clear that such "tidewater" or "ebb and flow" references were really synonyms for "navigable waters." As explained by Chief Justice Taney in *The Propeller Geneseè Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-55 (1851), the English reliance on the "tidewater" concept

> . . .was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, means nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the ad-

> miralty jurisdiction is confined to the ebb and flow of the tide. *In other words, it is confined to public navigable waters.* (Emphasis added).

This common law marriage between the term "tidewaters" or "ebb and flow" and the term "navigable waters" has been noted many times by this Court. *See, e.g., Illinois Central Railroad v. Illinois,* 146 U.S. 387, 436 (1892); *Packer v. Bird,* 137 U.S. 661, 667 (1891); *Barney v. Keokuk,* 94 U.S. 324, 337 (1876); *Jackson v. Steamboat Magnolia,* 61 U.S. (20 How.) 296, 299 (1857); and see *Donnelly v. United States,* 228 U.S. 243, 261 (1913). However, as *Genesee Chief* noted, the "tidewater" description that was often applied to English navigable streams is confusing and "utterly inadmissible" in the United States. 53 U.S. (12 How.) at 457. In this country, we have "thousands of miles of public navigable water, including lakes and rivers [in interior states] in which there is no tide." *Id.* The generic common law term, "navigable waters," is a more accurate description of public waterways in the United States. *Genesee Chief* was thus able to conclude that admiralty jurisdiction

> . . .is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.[6]

Id. at 457.

[6] *Genesee Chief* accordingly overruled *The Thomas Jefferson,* 23 U.S. (10 Wheat.) 428, 429 (1825); and *Waring v. Clarke,* 46 U.S. (5 How.) 441, 463-64 (1847). The Court in those cases had read the English references to "ebb and flow" as limiting admiralty jurisdiction to tidal waters. While conceding that the ebb and flow might limit the English admiralty jurisdiction, the *Genesee Chief* Court felt such a limitation totally misconceived the nature of the American continent.

Several lessons are to be drawn from the English common law regarding tidal ebb and flow:

1. The "tidewater" or "ebb and flow" terminology was often used interchangeably with "navigable waters" to refer to the public waterways of England, nearly all of which were navigable and also subject to the ebb and flow of the tide.[7] Such tidal description, as we have just seen, has been deemed "utterly inadmissible" in describing public ownership of waterways in the United States.

2. The "tidewater" or "ebb and flow" terminology was not meant to convey the notion that the mere presence of tidal influence in and of itself makes a waterway navigable. As Lord Mansfield wrote in *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K.B. 1774):

> *Ex facto oritur just* [out of the fact arises the law]. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate.

See also *The King v. Montague*, 4 B.&C. 598, 602, 107 Eng. Rep. 1183, 1184 (K.B. 1825), where, in reliance on Lord Mansfield's remarks, Bayley, J. stated that "it does not necessarily follow, because the tide flows and reflows

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[7] In *Mayor of Colchester v. Brooke*, 7 Q.B. 339, 373, 115 Eng. Rep. 518, 531 (1845), Lord Denman, C.J., wrote: "It cannot be disputed that the channel of a public navigable river is properly described as a common highway . . . and there is no one circumstance which more decisively affixes on a river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it."

in any particular place, that it is therefore a public navigation, although of sufficient size."[8]

3. The English common law recognized that the Crown's ownership of underwater lands was limited to the territorial seabed and the soil underlying arms of the sea, including navigable tidal rivers up to the ordinary high tide mark.[9]

4. Finally, English common law teaches that the Crown has no sovereign dominion as to lands under non-navigable waters. Such lands were invariably deemed subject to private ownership. No less an authority than Lord Hale, in his noted treatise *De Jure Maris*, reprinted in S.A. Moore, A History of the Foreshore, pt. 1 at 374 (1888), declared:

> There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people.

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[8] In *Miles v. Rose*, 5 Taunt. 705, 1 Marsh. 313, 128 Eng. Rep. 868 (C.P. 1814), Bayley, J. wrote that the flowing of the tide is not "absolutely inconsistent with a right of private property in the creek," although it creates a "strong prima facie evidence" of the creek being a public navigable river. See also S.A. and H.S. Moore, History of Law and Fisheries 166-167 (1903): "The mere fact of the presence of the tidal influence does not of itself make a place navigable . . . [i]t must therefore be a question of evidence in every case whether a particular part of any tidal water is or is not navigable."

[9] See *Le Roy v. Trinity House*, 1 Sid. 86, 82 Eng. Rep. 986 (K.B. 1662) (recognizing the Crown's original ownership of lands submerged under "tidal navigable rivers"); *Rex v. Smith*, 2 Doug. 441, 99 Eng. Rep. 283 (K.B. 1790) (recognizing Crown ownership of lands under a "navigable river"). The modern English rule is the same, restricting Crown ownership to lands under "all navigable rivers where the tide flows and reflows." *Gann v. Free Fishers of Whitstable*, 11 H.L.C. 192, 207; 110 Eng. Rep. 1305 (1865); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618; 11 Eng. Rep. 1155 &$863).

> Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris,* common highways for man or goods or both from one inland town to another.

In that 17th century statement, Lord Hale made no distinction between tidal or non-tidal waters. "[L]ittle streams and rivers that are not a common passage" were considered private property, regardless of tidal influence. These non-navigable little streams – like the eleven small drainage streams in the instant case – were outside the realm of Crown ownership.[10]

English case law has consistently followed the rule enunciated by Lord Hale, whose treatise appeared soon after the 1604 decision in *The Case of the Royal Fisheries of the Banne,* Davies' Rep. 149, reprinted in J. Angell, Tidewaters 35 (appendix) (1826). At issue were the title and fishing rights in the Banne River at a point where it was tidally influenced. As there stated:

> There are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; but in every other

[10] One noted authority, in discussing Lord Hale's treatise, declared: "In all this discussion there is no such distinction as navigable and non-navigable as depending on the flow of the tide. All rivers are *publici juris* which are capable of being navigated, and whenever Lord Hale wishes to make a distinction depending on tide water, he always says navigable waters where the tide ebbs and flows, thereby plainly indicating that he did not consider it sufficient to refer to tidal water by the word navigable only." H. Farnham, The Law of the Waters and Water Rights, Vol. 1, p. 114 (1904).

> river not navigable, and in the fishery of such river, the ter-tenants on each side have an interest of common right. The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows. . .

The *Banne* case does not say that only tidal rivers are navigable. Rather, it clearly distinguishes between navigable and non-navigable rivers, ascribing royal ownership to the former and private riparian ownership to the latter. Subsequent English cases are consistent with this dichotomy. *See e.g., Pierse v. Fauconberg*, I Burr. 292, 97 Eng. Rep. 320 (1757); *Rex v. Smith,* 2 Dougl. 441, 99 Eng. Rep. 283 (K.B. 1790); *Miles v. Rose,* 5 Taunt. 705, 128 Eng. Rep. 868 (C.P. 1814); *Rex v. Montague,* 4 B. & C. 599, 107 Eng. Rep. 1183 (K.B. 1825). As for ownership of non-navigable tidally influenced rivers, the only English case to discuss the issue from the time of Lord Hale until Mississippi achieved statehood was *The Mayor of Lynn v. Turner, supra,* wherein Lord Mansfield reiterated the common law rule that non-navigable tidal rivers are privately owned.

In sum, no English case has held that royal dominion extends to non-navigable tidal rivers. On the contrary, English courts and commentators alike have recognized that *"[i]n many small creeks and inlets of the sea private property may exist."* J.M. Gould, A Treatise on the Law of Waters, 97 (1883) (Emphasis added). The presence of the tide was merely an evidentiary presumption at best, capable of being rebutted by evidence of non-navigability. *Miles v. Rose, supra; Rex v. Montague, supra.* As Gould summed up the English common law, *Id.:*

> If the channel is broad and deep and adapted to the purposes of commerce, it is a natural con-

> clusion that it is a public navigation; but if it is a small creek, navigable only at exception and extraordinary tides, or at certain states of the tide, and then only for a short time and by very small boats, its inadaptibility for general use is strong, if not conclusive, evidence against the existence of a public right.

Thus, to the extent that the State of Mississippi or any of the original 13 states borrowed English common law as to ownership of non-navigable tidal streams, the rule adopted must have been one of private ownership. If the public trust is to be predicated on the common law, the Mississippi Supreme Court's historical reliance on the "ebb and flow" test must succumb to the actual navigability test evidenced by the English cases. See MacGrady, The Navigability Concept in Civil and Common Law, 3 Fla.St.L. Rev. 511, 545-587 (1975).

II. None of the Original 13 States Considered Their Public Trust Domain to Extend to the Soil Under Non-Navigable Waters Whether or Not Tidal.

The 13 original states are the divining rods of the equal footing doctrine. But none of those states, prior to 1817 made any definitive claim to public ownership to the soil under non-navigable waters. No public ownership claim was made by these states that exceeded what was asserted by the English Crown.

It being clear "that the navigable waters of England, and the soils under them, [were] held by the crown," *Martin v. Waddell,* 41 U.S. at 413-414, the same sovereign right to the soils under the navigable streams passed to the newly formed states upon their attaining independence from England. As the *Martin* opinion explained, *Id.* at 410:

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Each new state, upon entering the Union, acquires only those incidents of sovereignty that the original 13 states enjoyed when they formed the Union. The only incident of sovereignty respecting underwater lands that was universally recognized related to land under navigable waters, an incident borrowed from the English common law. See *Montana v. United States*, 450 U.S. at 551.

But there is no indication that any of the 13 states ever asserted dominion over the land beneath non-navigable streams and creeks, particularly those that are remote from the seacoast, simply because such waters are tidally influenced. Only two state court cases addressed the navigability issue prior to 1817, the year Mississippi joined the Union, and neither case supports the claim advanced in this case by Mississippi. Those two cases dealt only with the question whether navigable waters are restricted to tidally influenced waters.

In *Palmer v. Mulligan*, 3 Caines 307 (N.Y.S.Ct.105) Chancellor Kent, holding that the non-tidal part of the Hudson river was privately owned, misread English precedent to mean that non-tidal waters are not legally navigable; only tidal waters are legally navigable. That proposition is quite inapplicable to the geography of the United States, where many non-tidal rivers are navigable in fact. Most other American courts have repudiated

Chancellor Kent's view of the common law.[11] Indeed, *Palmer v. Mulligan* was later discredited in New York. See, *People v. Canal Appraisers,* 33 N.Y. 472 (1865), which rejected the doctrine that "all rivers above the ebb and flow of the tide, whether they are in fact navigable or not, belong to the land owners on each side, *usque ad filum adquae*." And see *Hooker v. Cummings*, 20 Johns 90, 11 Am. Dec. 249 (N.Y.S.Ct.1822), a New York court held that "navigability in fact is now regarded as the test of navigability in law."

The only other pre-1817 state court decision was *Carson v. Blazer*, 2 Binney 475 (Pa. 1810). The Pennsylvania court there held that title to the bed of the Susquehanna River remained in the Commonweath since the river was a public navigable river even above the flow of the tide. In the words of the Pennsylvania court, *Id.* at 467,

> The qualities of fresh or salt water cannot, amongst us, determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character.

Thus, even during the pre-1817 period, the ebb and flow test of navigability had a very short tenure. The one state that adopted it, New York, later repudiated it. Subsequent courts in some of the other original states repudiated the "tidality means navigability" notion out of hand, particularly the courts in Massachusetts and Connecticut.

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[11] Writing about Kent's doctrine's that in England, navigability was determined by the tidal flow, Farnham states that "[i]n fact the doctrine seems to have been taken for granted without much attempt to investigate the correctness of it, and to have have been stated as a premise from which to argue that the rule was not applicable in this country." *supra,* n. 10, at 106. Farnham documents the American rejection of tidal ebb and flow as a determinant of navigability with citations to several dozen cases from various state and federal courts. *Id.*

In Massachusetts in 1822, Chief Justice Parker flatly rejected the notion that "the property of the sovereign. . .extend[s] to all places where the tide ebbs and flows, whether such places are navigable or not." *Commonwealth v. Charleston,* 18 Mass. (1 Pick.) 179 (1822). He further wrote that in this country public property is confined to what may be of public use, so that

> in many little creeks into which salt water flows, but which are incapable of being navigated at all, private property may be maintained. This is undoubtedly the case with many of the creeks which run through our extensive marshes.

Id., at 186.

No doubt, Chief Justice Parker was stating what was commonly assumed in 1822, i.e., that "little creeks into which the salt water [tide] flows" are "undoubtedly" private property.

A few years later, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts reiterated the sentiments of his predecessor. In considering a case involving a bridge over a small tidal creek that was said to obstruct navigation thereon, *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 347 (1838), Chief Justice Shaw said that:

> . . .it is not every ditch, in which the salt water ebbs and flows, through the extensive salt marshes along the coast and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order

> to have this character, it must be navigable to some purpose, useful to trade or agriculture.[12]

Similar views were expressed by Justice Ellsworth of the Connecticut Supreme Court of Errors. Thus in *Groton v. Hurlburt*, 22 Conn. 177, 185 (1852), Justice Ellsworth quoted approvingly the above remarks of Chief Justice Shaw in *Rowe*. More importantly, Justice Ellsworth expanded on his view of the lack of public navigability concern with respect to small streams and coves. In *Wethersfield v. Humphrey,* 20 Conn. 218, 27 (1850), he wrote that a small "cove" cannot be said to be "navigable" simply because at times "a fish-boat, or skiff, or indian canoe may be pushed through its waters. . . .those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations." Any argument to the effect that all tidal streams are navigable and thus could not be obstructed without governmental sanction was termed "preposterous," for it

> . . .would convert numerous bridges over private rivers and inlets on the margin of Long Island Sound, into unconstitutional obstructions and public nuisances. . . .Such a doctrine has not been received, and never can receive, the sanction of any court of justice.

What we see, then, is a confluence of English common law doctrine and the doctrine of the original 13 states. Both doctrines agree that small inland waters, not commercially navigable, are not converted into navigability by virtue of tidal influence; and they are agreed that such non-navigable waters are subject to private ownership.

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[12] Cf. the statement of the Mississippi Supreme Court in the instant case that it is enough if "one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land." Pet.App. 12a.

The following is a list of the kinds of waters that the English and early American courts and writers considered non-navigable even though tidally influenced:

England, per Lord Hale	"little streams and rivers"
England, per Lord Mansfield	"a creek in their own private estate"
Massachusetts, per Chief Justice Parker	"little creeks into which the salt water flows"
Massachusetts, per Chief Justice Shaw	"every ditch, in which the salt water ebbs and flows"
Connecticut, per Justice Ellsworth	"coves" and "private rivers and inlets"

Courts in states other than the original 13 have expressed similar sentiments. See, e.g., *McManus v. Carmichael*, 3 Iowa 1 (1856), where Justice Woodward wrote that there are "many waters where the tide flows [that] are not in fact navigable, and many where it does not flow are so. It is navigability in fact which forms the foundation for navigability in law."[13]

As one commentator has put it, the early American perception of the common law "was that the beds of the tidal, navigable waters were owned by the King in his sovereign capacity and, at least since the Magna Carta, held in trust for the people. In its initial form, then, the public trust developed in this country as an adjunct of the ownership of the beds of the navigable waters, an attribute

[13] The *McManus* case was cited with approval in *Barney v. Keokuk*, 94 U.S. 324, 336 (1876), which surveys the common law of several states respecting the ownership of lands submerged under navigable waters. A more comprehensive survey was made in *Shively v. Bowlby*, 152 U.S. 1 (1894).

of sovereignty inalienable in nature." Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L. Rev. 195, 200 (1980). It was precisely that attribute of sovereignty that Chief Justice Taney carried forward into the federal doctrine of public trust ownership. *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

But, to repeat, the ownership of the small non-navigable streams and ditches never was considered an attribute of sovereignty at common law, here or in England. Conceptually and practically, it never became a part of the public trust. The ownership of what Lord Hale called the "little streams and rivers" remains today where it was at common law – in the hands of private landowners. It follows that Mississippi's public trust claim to the bayous and drainage streams involved in this case must fail.

III. This Court Has Never Recognized That States Have Public Trust or Equal Footing Dominion Over Lands Under Non-Navigable But Tidally Influenced Waters.

Mississippi's claim before this Court fares no better from the perspective of the Court's jurisprudence respecting the public trust doctrine and the equal footing doctrine. Both doctrines are concerned only with lands submerged under navigable waters, whether or not those waters be tidally influenced. There is no precedent, as the Mississippi Supreme Court was forced to concede (Pet. App. 9a), for invoking either doctrine solely in terms of the tidal ebb and flow, without regard to navigability in fact.

A. The public trust doctrine

The federal "public trust doctrine" was born in 1842, mothered by this Court's decision in *Martin* v. *Waddell,* 41

U.S. (16 Pet.) 367 (1842). The question there was whether New Jersey or the riparian proprietor held title to submerged beds under "the navigable waters of the Raritan river and bay" in New Jersey, "where the tide ebbs and flows." *Id.* at 407. Speaking through Chief Justice Taney, the Court declared that at common law the "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust." *Id.* at 411.[14] The Court then declared that the 13 original colonies or states, following the Revolution, held "all their navigable waters and the soils under them for their own common use." *Id.* at 410. New Jersey was thus held entitled to ownership of these navigable wetlands.

Three years later, in *Pollard's Lessee* v. *Hagan,* 44 U.S. (3 How.) 212 (184), a case arising out of Alabama, the Court extended and applied the public trust doctrine to all states subsequently admitted to the Union. The theory expressed was that, during pre-statehood periods when lands were held on a territorial basis, the Federal Government held all lands beneath navigable waters and the shores thereof in trust for the future states. Upon admission, each new state – to maintain its equal footing with the

[14] *Martin v. Waddell* strictly applies only to the original 13 states, New Jersey being one of them. Chief Justice Taney did cite one early New Jersey case, *Arnold v. Mundy,* 6 N.J.L. 1 (N.J.S.Ct. 1821), which has been said to be the main source of Taney's public trust doctrine. MacGrady, The Navigability Concept in the Civil and Common Law, 3 Fla.St. U.L. Rev. 511, 590-591 (1975). *Arnold v. Mundy* declared the law of public trust basically as we know it today. It declared that rights in the beds of navigable streams had been held by the Crown in trust for the common use of the people, that the states succeeded to this trust, and that a grant purporting to divest the citizens of these common rights was void. Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L.Rev. 195, 199-200 (1980).

original 13 states – was deemed to have received such trust property from the United States, the trustee.[15] See, generally, *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-76 (1977).

Navigability is the *sine qua non* of the public trust doctrine. There are, to be sure, various definitions of navigability, dependent upon whether the problem arises in the context of the extent of admiralty jurisdiction, the regulation of navigable waters under the Commerce Clause, or the ownership of submerged lands. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1975).[16] The Court's seminal definition of "navigable waters" was articulated in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), an admiralty case. The Court there decreed:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel over water.

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[15] The same description of the doctrine is found in *Block v. North Dakota*, 461 U.S. 273, 277 (1983); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922); *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894); *Illinois Central Railroad Co. v. Illinois*, 145 U.S. 387, 434-435 (1892).

[16] "Navigable water" subject to federal admiralty jurisdiction was defined as including waters that are navigable in fact in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852). The definition for purposes of exerting federal power may often be more expansive. *United States v. Appalachian Power Co.*, 311 U.S. 377, 426-27 (1940).

Although *The Daniel Ball* was an admiralty case, the Court has adopted this "navigable in fact" definition as the basic federal test to locate those submerged lands to which the states hold sovereign title under the public trust doctrine. *The Daniel Ball* test of navigability in fact was first brought into the public trust arena in *Packer v. Bird*, 137 U.S. 661 (1891). Justice Field there compared American and English geography, noting that the ebb and flow test was used in England because only tidal rivers were, in fact, navigable. Applying the *Daniel Ball* navigability in fact test to non-tidal rivers, Justice Field said:

> The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. *It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them.*
>
> *Id.*, at 667 (Emphasis added).

The Mississippi court's application of the tidal test to non-navigable bayous and drainage ditches is wholly in conflict with the essential purpose of the public trust doctrine, as stated by this Court in *Packer*. Public ownership of tidelands is predicated upon their significance as highways for commerce. Seen in this light, it becomes obvious why the navigability in fact test must be applied consistently to exclude non-navigable streams, creeks, ditches and bayous from the public trust. Drainage ditches that lie wholly within the bounds of private property, such as

those involved in the instant case, simply have no significance at all as "highways of commerce."[17]

Packer was the only first of the public trust cases to apply the navigability in fact test. Two years after *Packer, Shively* v. *Bowlby,* 152 U.S. 1 (1893), upheld a title claim to navigable tidewaters based on a grant from the State of Oregon, as against a patent from the United States.[18] Later, commenting on the *Shively* case, the Court in *McGilvra v. Ross,* 215 U.S. 70, 78 (1909), declared:

> And the term "navigable waters," as there used [in *Shively*], meant waters which were navigable in fact. The definition was not inadvrtent or unnecessary. It was that to which the reasoning conducted and which became the test of the dominion over shore lands and the rights which they had or could convey.

Thus the test of state dominion over public trust wetlands is navigability in fact. This is equally true whether the lands are tidal, as in *Shively,* or non-tidal as in *McGilvra.* For the policy reasons announced by the Court in *Packer,* namely the public interest in commercial navigation, the navigability in fact test is "not inadvertent or unnecessary.," It is that to which the reasoning conducts, whether the lands at issue be tidal or upland, navigable or wholly non-navigable.

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[17] In the eyes of the Mississippi Supreme Court, the public trust domain includes lands under non-navigable waters "regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union." Pet. App. 15a. The court does not even require that those water courses have been "susceptible" to navigation "for commerce," as *The Daniel Ball* Court insisted they must be in order to be considered navigable.

[18] The Court held that the United States did not convey title to navigable waters, since it held those lands in trust for the states. *Id.*

For this reason, *McGilvra,* 215 U.S. at 78, categorically rejected the "ebb and flow" test, declaring that "the test of navigability of wateres insisted on [ebb and flow] has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443, and is therefore no test of riparian ownership." In fact, the ebb and flow test never did have any place in determining state ownership of public trust lands even before *Genesee Chief.*

In the final analysis, the decision below is at war with the unbroken line of cases in this Court rejecting tidal ebb and flow, and establishing navigability as the essential predicate of the public trust doctrine.[19] It remains for the Court to reject Mississippi's argument that the tidal ebb and flow is an alternative and independent measure of that state's public trust domain. Such has never been the law; such should never be the law.

B. The equal footing doctrine

Mississippi's claim to these non-navigable but tidally influenced wetlands fares no better under the equal footing doctrine than it does under the public trust doctrine. Both

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[19] Some cases speak of this doctrine in terms of "shore lands," "tidelands" or "tidewaters." E.g., *Shively v. Bowlby,* 152 U.S. 1, 49, 57 (1894); *Knight v. U.S. Land Association,* 142 U.S. 161, 183 (1891). But such "tideland" references, apart from reflecting some of the confusion stemming from the common law heritage, are usually made in a coastwise setting in the course of defining "the geographical, chemical, and enviromental limtis of the three oceans and the gulf that wash our shores . . . bodies of water [that] in the main are navigable." *Kaiser Aetna v. United States,* 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting). This Court has never used "tidelands," "shore lands," or "tidewaters" to refer to a body of water, or the soil underneath, that is not an integral part of a navigable ocean or lake.

concepts recognize only those wetlands that are navigable in nature, or, more precisely, those that are navigable in fact.

These two doctrines spring from the same source, i.e., the lands under navigable waters that were first held by the United States or the first 13 states thereof in trust for the people. As was said in *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46, 68 (1874),

> By the American revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.

Or, as repeated in *Scott* v. *Lattig*, 227 U.S. 229, 243 (1913), "each new State, upon its admission to the Union, becomes endowed with the same rights and powers in this regard [soverign ownership of lands underlying navigable waters] as the older ones." See also *Block* v. *North Dakota*, 461 U.S. 273, 277 (1983); *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387, 434 (1892); *Barney* v. *Keokuk*, 94 U.S. 324, 338 (1876).

As we have seen, none of the original 13 states ever established a common law or public trust proprietorship over the lands beneath the non-navigable little streams and creeks. They borrowed from the common law no more than the concept of Crown ownership of the navigable streams and the lands beneath them. Thus, under the equal footing doctrine first enunciated in *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 230 (1845), a state like Mississippi —

upon its admission to the Union in 1817 – could acquire only "the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown." *Utah* v. *United States*, 403 U.S. 9, 10 (1971). Mississippi could acquire no more or no less than what the original states had acquired in their sovereign capacity. And since the original states had no sovereignty over the lands beneath non-navigable streams, Mississippi could acquire no sovereign rights thereto upon achieving statehood.

To recognize that Mississippi in 1817 acquired dominion of the soils underlying the tiny little streams and bayous in this case would do violence to common sense as well as the equal footing doctrine. It would be contrary to the congressional resolution that admitted Mississippi "into the union on an equal footing with the original states, in all respects whatever." 3 Stat. 472, 473 (Dec. 10, 1817). In short, it would give Mississippi an unequal and therefore an unconstitutional footing.

Such a result, moreover, would implicate the taking provision of the Fifth Amendment, for the soil under these non-navigable waters has long been held by private owners, even before 1817 and certainly ever since. These are lands that even ancient common law recognized as susceptible to private ownership. Private property cannot be taken by a state, at least without paying just compensation, on a mistaken assumption that the property was somehow acquired by the state at the time of statehood. *See* Pet. App. 24a.

As was said by Justice Clark of the Supreme Court of California, dissenting and concurring in a closely similar situation, *State* v. *Superior Court of Lake County*, 172 Cal. Rptr. 696, 713, 625 P.2d 239, 256 (1981), "To impose the trust at this late date [130 years later] on all property

within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible." See also Justice Clark's dissent in the companion case, *State* v. *Superior Court of Placer County,* 172 Cal. Rptr. 713, 719, 625 P.2d 256, 262-63 (1981).

IV. The Position Here Advanced by the State of Mississippi Would Result in an Inequitable and Retroactive Adjustment of Countless Land Titles.

The impact of the decision below upon the private owners of the underwater land in question, as well as all others who have dealt with them in good faith, is too obvious to require elaboration. Property has been transferred and inherited, taxes have been paid, and various other kinds of property expectations and interests have matured since Mississippi joined the Union in 1817. The inequities are painfully obvious, to say nothing of the expenses of litigating record title to these long-held wetlands.

The Mississippi Supreme Court has silenced the private landowners from making any protest about these inequities. The court has foreclosed any claims based on equitable estoppel, adverse possession, limitations or laches. Pet.App. 25a. Thus the State has been held free to impose its fee title retroactively, and without legal jeopardy, all the way back to 1817. It is ironic, but also a fact, that the State's claim is itself flawed under the public trust and equal footing principles.

Many years ago, when considering a mistaken claim of only five years duration, this Court indicated that "it must be a very strong case indeed, and one where mistake and error had been evidently committed," to justify reversing a decision awarding title to real property, "thereby destroy-

ing rights of property which may have been purchased and paid for in the meantime." *Goodtitle* v. *Kibbe*, 50 U.S. (9 How.) 471, 478 (1850).

Petitioners suggest that when more than 150 years have elapsed, the case for retroactive adjustment of countless land titles must be more than "very strong." Mississippi has failed to make such a case.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Mississippi should be reversed and the case remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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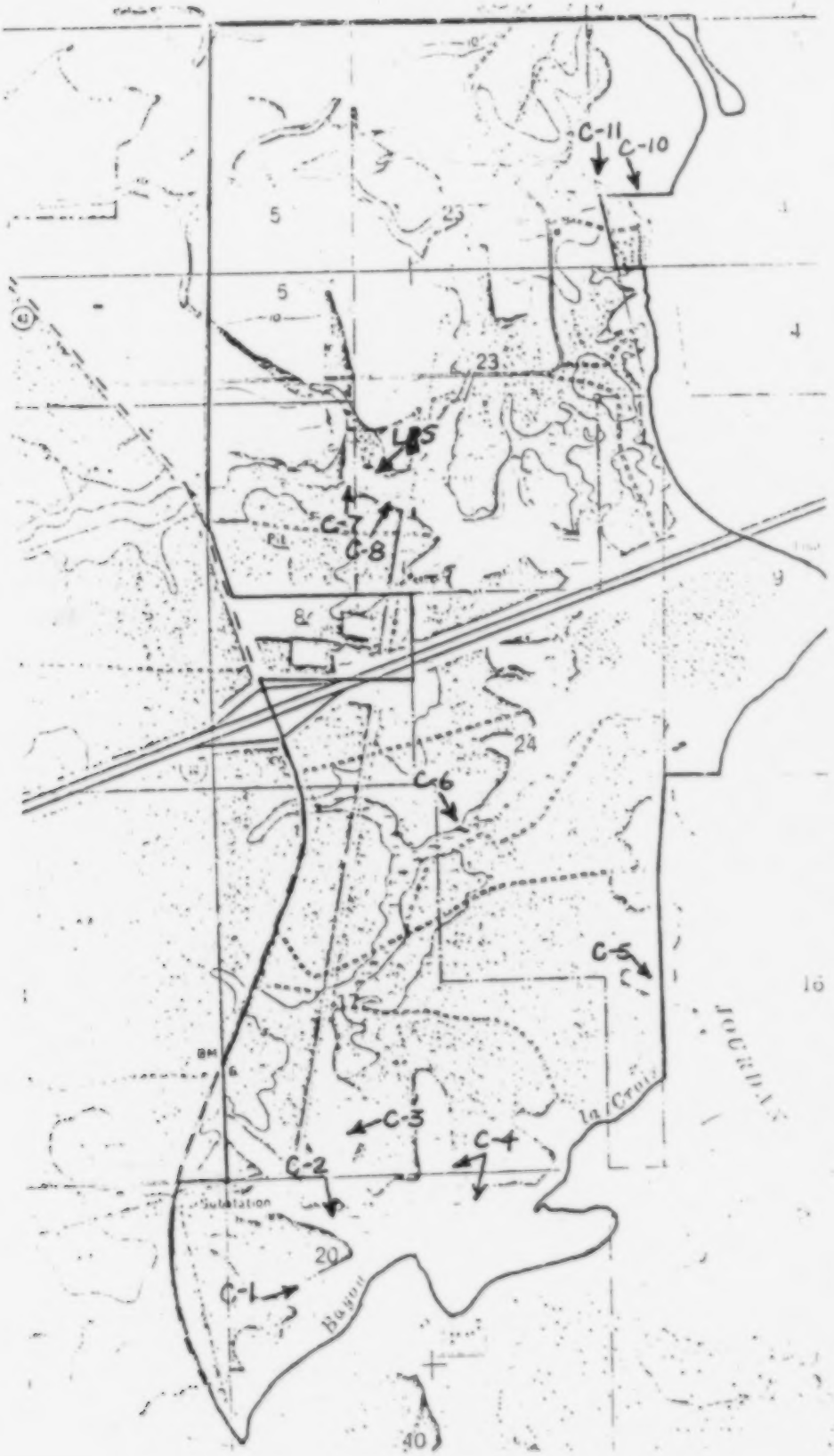
APPENDIX

The attached map is the portion of Exhibit P-167 which shows the area in dispute. Exhibit P-167 was made by taping together U.S. Coast and Geodetic quadrange maps for the Waveland and Kiln quadrangles as photo revised in 1976.

The black line was placed on the map to show the petitioners' boundary line was established by their record titles. The designations C-1 through C-11 were placed on the map to show the State and Sage's claim. These designations are references to the inland creeks claimed by the State as generally designated on three large aerial photographs S-174, S-175 and S-176. In addition to the Creeks the State also claims the North branch of Bayou LaCroix at C-4 and the two lakes in the middle of the map.


C-11
C-10
C-9
C-7
C-8
C-6
C-5
C-3
C-4
C-2
C-1
Substation
Bayou
La Cruz
5
23
24
20
40